

***United States Court of Appeals  
for the Second Circuit***



**TRANSCRIPT**





74-1848

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p/s

IN THE UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

HERBERT GARVEY,  
Appellant

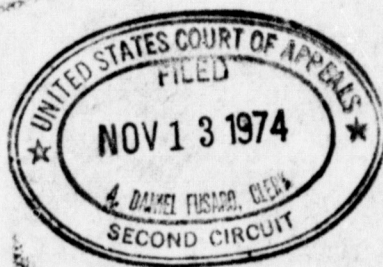
vs.

CASPAR WEINBERGER,  
Appellee

CIVIL APPEAL NO. 74-1848

On Appeal From The United States District Court  
For The District Of Vermont

TRANSCRIPT, ORDER AND  
MEMORANDUM OF MAY 31, 1974  
APPEALED TO THIS COURT



Patrick R. Berg  
Vermont Legal Aid, Inc.  
51 1/2 Merchants Row  
Rutland, Vermont 05702  
Attorney for Appellant

1 UNITED STATES DISTRICT COURT  
2 For The  
3 DISTRICT OF VERMONT

4 -----)  
5 HERBERT GARVEY )

6 vs )

) Civil Action #74-71  
)

7 CASPER WEINBERGER, Secretary )  
8 Health, Education and Welfare )  
9 -----)

10 31 May 1974, at Rutland, Vermont.

11 Before The Honorable James S. Helden, Chief, U.S. Dist.  
12 Judge, For The District of Vermont, on Plaintiff's  
13 Motion to Convene Three-Judge Court and For Preliminary  
14 Injunctive Relief.

15 Appearances:

16 The Honorable DAVID REED  
17 Assistant United States Attorney

18 PATRICK BERG, Esquire  
19 Attorney for the Plaintiff.  
20  
21  
22  
23  
24



1 THE COURT: Is everybody present in the  
2 next case, Mr. Clerk?

3 THE CLERK: Yes, Your Honor.

4 THE COURT: We will hear you, Mr. Berg.

5 MR. BERG: Yes, Your Honor, this morning we  
6 are here for my motion to establish this action as a class  
7 action, to establish or to ask for a three-judge court and to  
8 ask for preliminary injunctive relief in this particular mat-  
9 ter and if you have received, Attorney General, this is At-  
10 torney General's Opinion, in the papers here, I find that my  
11 client, or at least my client's son has received a notice  
12 which says that social security benefits are going to be paid  
13 directly to him and that notice is dated May 22nd and I did  
14 not receive - my client has not received a copy of that as  
15 far as I know, to this date, nor, have I.

16 THE COURT: You mean the Defendant's Motion  
17 to Dismiss?

18 MR. BERG: It's dismissed the motion for class  
19 action, it's in opposition to my motion for class action  
20 status but I assume he would use that for a basis for saying  
21 that my class is moot. In fact, that the notice, this notice  
22 is sent out is the basis for the motion to dismiss and the  
23 opposition to my class action status, assuming that as long  
24 as my client is going to receive his benefits directly and

1 that is the relief that I asked for in the Complaint for him  
2 directly, that the Secretary is granting the relief through  
3 administration action, does satisfy my particular complaint.  
4 I think that the only fair in considering the fact that the  
5 notice was sent to my client's son and not to him, which has  
6 been indicative of this social security administration's  
7 attitude toward my client during this whole affair has been  
8 a rather dealing with everyone else except for him and I  
9 think that it is only fair to at least wait and see exactly  
10 whether or not my client is in fact going to receive this  
11 notice and is in fact, going to receive these checks in his  
12 own name from now on.

13                   Assuming that, assuming that he is, then  
14 we have the question of whether or not the original be taking  
15 away of his status as recipient for his own social security  
16 payments without notice, without hearing or opportunity to  
17 contest that activity. Whether or not the fact that his  
18 social security now through its own administrative procedures  
19 or its own restoring his account to him, make this case moot  
20 I do not think so. I think that we would have to submit  
21 further motion, further memorandum on this point. It seems  
22 to me the issue is whether or not someone who commits a wrong  
23 that is somebody who deprives someone of a benefit without  
24 due process, can remedy that wrong altogether by at least



1 ~~threatening~~ to him what he took away then say at that particular  
2 point in time that there is no longer a case which has any  
3 justiciability to this particular argument has been incorpor-  
4 ated in a number of situations before this time, in GOLDBERG  
5 against KELLEY, it was encountered and in a number of other  
6 cases, it has been encountered and just exactly whether or not  
7 this constitutes mootness I think that the proper way to handle  
8 this at least at this particular time, is for me to submit a  
9 Memorandum as to why I feel that it does not constitute moot-  
10 ness.

11           Okay, assuming that my client does not re-  
12 ceive his check and in other words, that it is he does not  
13 receive it directly in his name and if we still are to proceed  
14 on that basis at this particular time, I think that in terms  
15 of the relief that is that I am asking for if I am asking for,  
16 as a preliminary injunctive relief that my client's account  
17 be restored to him directly, the Social Security Administra-  
18 tion has sort of proceeded on its own in this particular  
19 matter and in the sense that my client has not requested  
20 through any administrative channel, that his account be re-  
21 stored except by letter, but he has not entered into proced-  
22 ures and administrative channels to do this and in that sense  
23 it seems to me that an order from this Court at least if it  
24 confirms what the administration proposes to do that is fine,

1 but it seems to me an order of this Court might be appropriate  
2 in order to make sure that my client does get his check.  
3 The fact that his son has gotten a check as my client's repre-  
4 sentative payee as I have argued before, still deprives him  
5 of the right to access to his own affairs, the right to govern  
6 his own affairs, his own financial status, the basis upon  
7 which the Social Security Administration awarded the amount  
8 of money that he receives or the amount was based on his com-  
9 mitment, his son had nothing to do with that commitment to be-  
10 gin with and it seems certain that the relief by this Court  
11 would be necessary to restore his status quo, or the situation  
12 that existed before the wrongful action was engaged in by  
13 the Department and that is the situation where that my client  
14 did receive his own account.

15               The term the likelihood of success in terms  
16 of this action I think that we certainly have if we assume  
17 that the defendant has still maintains that the deprivation of  
18 his account is done properly that I think the likelihood of  
19 our success of prevailing on the merits is still very good and  
20 that is that the account was taken from him wrongfully without  
21 due process and that there are a raft of cases which applied  
22 in economic benefits such as Social Security cannot be taken  
23 away from the recipient without some form of due process.  
24 And I think all likelihood of success is great and therefore,



1 the preliminary relief should be awarded in this particular  
2 case.

3 As far as the empaneling of a three-judge  
4 court we are challenging the constitutionality of Federal  
5 statute that is the representative payee statute and Social  
6 Security Administration Section 405 and that section if it does  
7 not provide for a right to due process and a hearing and notice  
8 before the rights are taken away from the recipient, then it  
9 should provide that those rights, the statutes not read, if  
10 those rights are not read into that particular section, then  
11 we are indeed challenging a Federal statute and the empaneling  
12 of a three-judge court will be proper relief in this case.

13 I think the class action alleges, the  
14 allegations, make it the class action allegations that the  
15 members of the class at least upon this point in time, have  
16 not been established but I think I, that I did make a proper  
17 submitted interrogatories to the United States on this par-  
18 ticular issue in order to determine who those members are  
19 since that information would be properly within his knowledge  
20 and I do think attainable by him of checking records, those  
21 records are all kept in the national office in Baltimore and  
22 I would expect the identity of those persons who are in  
23 Mr. Harvey's similar situation could be identified and that  
24 those persons that the, I would assume that the number of

PAGE 1  
persons involved in this action are similarly situated that  
it would not be feasible to join them in this particular  
action, although I could not substantiate that particular claim  
until we do have information requested by the interrogatories  
to establish who these persons are. Once these people, once  
the defendant provides that information, it seems to me that  
the class is certainly identifiable that the notice problems  
would not be, would probably not be insurmountable since we  
would know by the defendant's own admission, exactly who  
these persons are, who have been deprived of their own account  
and have had representative payees substituted for their  
accounts.

I think the, we can fairly and adequately  
represent the interests of those persons who have had their  
accounts taken away from them without due process in that we  
can give proper notice and this litigation could be, is not  
so much of a nature that, that it involves in every case,  
personal reasons or every person's case or every facts situa-  
tion would be such that it would necessarily not mitigate the  
need for due process. It seems to me each of these persons  
regardless of their acts situations is, should be entitled to  
due process and therefore I think we can fairly and adequately  
represent the interests of these people and that -

THE COURT: Well, in your present posture,



PAGE 3  
1 as I understand it, you've got all the relief which has been  
2 requested it would appear upon the face at least, that you've  
3 got the money that the check is going to be payable to Herbert  
4 P. GARVEY, and his payments will be paid directly, now how  
5 could you represent the rest of them on that circumstance?

6 MR. BERG: Well, Your Honor, if, if the, if  
7 the, if it is true that my client is supposed to receive his  
8 money directly, it seems to me there probably is still a class  
9 of persons my client is in, and represents - (SIMULTANEOUS  
10 VOICES).

11 THE COURT: Have you, - have you read the -  
12 (Interrupted by Mr. Berg)

13 MR. BERG: He still represents a class of  
14 persons who has had this wrong done to him and the question is  
15 whether, I mean, it sort of all goes back to this question of  
16 whether or not my client is, my client's claim is moot. If my  
17 client's claim is moot, he obviously couldn't represent all  
18 these other people, but if his claim is not, it seems to me  
19 that he can, but, represent those other people but if his  
20 claim is not it seems to me he can represent those other people  
21 in the sense that the same wrong has been done to them. The  
22 wrong of, the wrong being the lack of due process of taking  
23 away their status as payee and that is how he would represent  
24 these, each of these persons. The fact, - the fact of each  
particular persons reasons why their status was taken away or

1 the amountsof money and all of that, those are all individual  
2 facts that would exist even if my client were still being  
3 deprived of his checks.

4 MR. REED: Your Honor, I will have to object  
5 to the, a misrepresentation of the facts which was in plain-  
6 tiff's original complaint and/was in his argument and/just  
7 stated again, he's met, that there's been no showing that  
8 the fact of the matter that Mr. HARVEY has ever been deprived  
9 of the payment of his social security benefits.

10 THE COURT: No, the Court understands at the  
11 last hearing that all that, he had received the proceeds of  
12 every check that he was entitled to.

13 MR. BERG: Yes, I am not arguing, don't mis-  
14 udnerstand me, I'm not arguing that he has not received the  
15 proceeds and saying he has not received his check in the  
16 sense that he is entitled to receive a check from the Depart-  
17 ment, it doesn't say in the statute that he is entitled to the  
18 proceeds, he is entitled to that particular check and he has,  
19 he is entitled to do with that check what he wants to do but  
20 that is what this case is about. The fact, I mean, if I, I,  
21 the counsel is right, that my first allegation that he had  
22 not received the proceeds was not correct and I did, I have  
23 gone back from that particular statement. I am not, I, I am  
24 maintaining here, that my client's situation is not made any



1 different by the fact that the Department is now going to  
2 give him the check in his own name because the wrong, I'm  
3 talking about the wrong that was originally done to him, is  
4 being deprived of his status without due process.

5 THE COURT: Mr. Reed, I suppose the date of  
6 this benefit information dated, regarding Claim 132-22-0840 that  
7 you attached, which apparently originated from the Bureau of  
8 Retirement Survivors Insurance Social Security, Northeastern  
9 Program Center, Flushing, I take it that that won't take ef-  
10 fect until either the payment of the June benefits that are  
11 due the first of June?

12 MR. REED: Yes, Your Honor, as I understand  
13 it from speaking with the Social Security General Counsel's  
14 office they are trying to make it effective as of June.  
15 However, I would at this time orally support my motion under  
16 12(b)6 and under, and also under 12(b) unless the Court has  
17 the intention of undertaking jurisdiction for purposes of  
18 mandamus in the social security administration for doing what  
19 has been requested and what they had responded to on the basis  
20 that again we will, number one, although this argument may  
21 seem rather simple-minded, it may or may not be a due process  
22 issue, but a law suit needs a plaintiff and we would move that  
23 there isn't a plaintiff here because he doesn't have a claim  
24 upon which relief can be granted, but the simple fact that he  
has been granted.

1 Now, I would be lying in reality if I indi-  
2 cated that it wouldn't be the Court's concern, and my concern  
3 as well as the concern of the plaintiff, if Mr. HARVEY weren't  
4 to directly receive his check, however, I would submit now  
5 what's marked as Government's Exhibit "A", which is the  
6 have  
7 original I/received and presupposing irregularity in the busi-  
8 ness proceedings of the Social Security Administration, I  
9 submit that relief granted, the relief in question has been  
10 granted, merely by reinstating Mr. HARVEY, although that may  
11 seem hypertechnical that was the request and that was the  
12 supposed due process argument.

12 THE COURT: Isn't, do you know why they  
13 didn't notify Mr. Harvey?

14 MR. REED: Well, Your Honor, at this, no, I  
15 don't know as a fact, but I would suppose it is an assumption  
16 I got in touch with Mr. GOLDBERG in the Social Security Adminis-  
17 tration and I think he yanked that out of the normal process  
18 of the mail and my office received it by Air Mail because I  
19 indicated that we would have a hearing today and I wanted to  
20 substantiate what he told me over the telephone, again, an item  
21 in response, not as anything as far as plaintiff's argument  
22 goes, but which is something I just feel I should advise the  
23 Court of or indicate is that the Social Security Administration  
24 is looking into this matter and I would cite the case of

WRIGHT versus RICHARDSON where the Supreme Court decided that



1 the Social, - that the Secretary has a right to sometimes re-  
2 view these procedures if there are raised issues of irregular-  
3 ity. However, I would, the Government's position would be that  
4 the, to further request the Court to dismiss this action as it  
5 now stands and if and when, this would be presupposing that Mr.  
6 HARVEY would get his check, which I think is a fair presupposi-  
7 tion as a legal matter the way the case stands now we would  
8 submit that there is no proper party plaintiff in this matter.  
9 If the Court is interested, I will respond directly to the  
10 motion concerning the three-judge court and a class action.

11 We don't have any intention to boot-strap  
12 it on the nature, on, on, sole issue that there is no claim,  
13 however, that obviously has something to do with the likelihood  
14 of success in the other issue which the Court should consider  
15 in considering whether to grant the motion for a three judge  
16 court or to whether to grant the motion for a class action.

17 THE COURT: Are you prepared to pay the  
18 costs of notifying all the people in the class?

19 MR. BERG: Well that, Your Honor, is a prob-  
20 lem in terms of, at the moment, until we discover exactly the  
21 number of those persons. I could make a representation as to  
22 that particular item. I would say that if, if there, the  
23 number of those persons is not, is not an extremely large  
24 number, that is in terms of mailing costs, if that were not -

1 THE COURT: Well, the Court will rule that  
2 the Defendant's Motion for convening a three-judge court is  
3 denied for want of substantial Federal question. The Court  
4 rules that the plaintiff has failed to sustain his burden to  
5 have the case certified as a class action so the request for  
6 that class action is denied. The case will be continued to  
7 determine whether or not Mr. Herbert GARVY, the plaintiff has  
8 received the notice, which apparently originated from the  
9 Department of Health, Education and Welfare, Northeastern  
10 Program Center, Flushing, New York, dated May 22, 1974, re:  
11 Claim #132-22-0840 which makes it appear to the Court that the  
12 social benefits for Herbert P. GARVEY, shall be paid to Herbert  
13 P. GARVEY, directly as re, and this is entirely consistent  
14 with the relief sought by the plaintiff in his complaint.  
15 The Court will continue this case for thirty days to determine  
16 whether or not the Herbert P. Garvey has received the notice  
17 of May 22, 1974 and whether that, the social security checks  
18 have been redirected to him as indicated in the notice.

19 MR. REED: Your Honor, may I just ask a ques-  
20 tion so as not to further tax the Court's time, would a letter  
21 from counsel either myself or Mr. BERG, satisfy the Court for  
22 the receipt of this check?

23 THE COURT: That will be adequate. At the  
24 end of the thirty days the Court will dismiss the action and



1 it may well be that we could dismiss it at this point subject  
2 to renewal within sixty days if in case the relief isn't pro-  
3 vided.

4 MR. REED: Your Honor, we would ask that that  
5 be the first course of action, for the possibility that I, if  
6 the Court is in agreement with the Government's position, this  
7 wouldn't be a situation where someone could step in the shoes  
8 of a non-existent plaintiff. We would ask that the Court  
9 would dismiss with it with the full understanding that, you  
10 know, it could be re-opened, concerning the one issue as I  
11 believe the Court is limited to which would be the actual  
12 receipt of the check.

13 THE COURT: Yes, we'll enter an order of  
14 dismissal dated today with leave for the Plaintiff to request  
15 the Court to reopen the case in the event the relief obtained  
16 through administrative action would, by request to the Depart-  
17 ment of Health, Education and Welfare as appears in Govern-  
18 ment's Exhibit "A". If that does not, if that relief is not  
19 forthcoming, we'll entertain a motion on the part of the  
20 plaintiff, to reopen the case.

21 MR. BERG: Your Honor, would you accept the  
22 Memorandum on the mootness in this case -

23 THE COURT: pardon?

24 MR. BERG: Would you accept a Memorandum on  
mootness on the whole, I mean, it seems to me this is the

1 basis of the Court's ruling and it seems to me that if, if  
2 you allow me time to submit such a Memorandum and delay the  
3 dismissal until you have considered my Memorandum?

4 THE COURT: Yes, but we'll allow it. It  
5 may not be moot, if he hasn't got his money.

6 MR. BERG: That's true, but assuming he has  
7 gotten that money, well, okay, I assume the better thing to  
8 do then, if you are going to dismiss it, if I have the right  
9 to reopen, or if he does in fact get his money, if I do submit  
10 a Memorandum at the time that he has gotten his money, so  
11 then we are at least sure of the facts at that time, can I  
12 then submit a memorandum for purposes of reopening the case?

13 THE COURT: You can submit a Memorandum in  
14 support of your request to reopen but I would like to have  
15 the facts stated as to whether or not you will - (INTERRUPTED)

16 MR. BERG: Yes I understand that, Your Honor.

17 THE COURT: And you can do that any time  
18 within, within -

19 MR. BERG: Within sixty days.

20 THE COURT: Sixty days.

21 MR. BERG: Thank you.  
(Hearing ended)

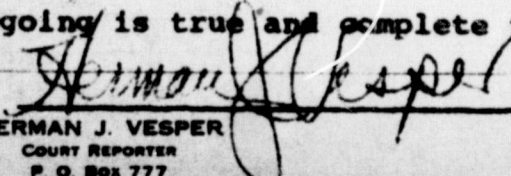
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23

24

CERTIFICATE

I hereby certify the foregoing is true and complete transcript.

  
HERMAN J. VESPER  
COURT REPORTER  
P. O. BOX 777  
ST. ALBANS, VERMONT 05570





**UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT**

**HERBERT GARVEY**

**vs.**

**CASPER WEINBERGER, SECRETARY  
OF THE DEPARTMENT OF HEALTH,  
EDUCATION AND WELFARE**

**Civil Action**

**No. 74-71**



**ORDER OF DISMISSAL**

The Court upon oral and written argument of counsel for the parties presented this day, It Is ORDERED

1. Plaintiff's motion to have the cause certified as a Class Action is denied.

2. Plaintiff's motion to convene a Three Judge Court is denied.

3. This action is hereby dismissed without costs and without prejudice to the right, upon good cause shown within 60 days, to reopen the action if the social security benefits issued by the Defendant are not paid directly to the Plaintiff as indicated in Government's Exhibit A.

IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order, by United States mail, upon the attorneys of record for the parties appearing in this cause.

Dated: May 31, 1974  
Rutland, Vermont

**JAMES S. ELDEN**  
**CHIEF JUDGE**

Endorsed: Filed May 31, 1974

**KEITH L. SYLVESTER**

Deputy Clerk

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

Herbert P. Garvey

v.

Casper Weinberger,  
Secretary of Department  
of Health, Education  
and Welfare

Civil Action

File No. 74-71



MEMORANDUM

This action for mandamus, against the defendant, Secretary of Department of Health, Education and Welfare, was designated a class action by the complainant, Herbert Garvey. The complaint further requested a three-judge court be convened, pursuant to 28 U.S.C. § 2282, to grant injunctive relief to restrain the defendant from issuing social security benefits to his son as his representative payee. The complaint was filed March 8, 1974, with the court's permission to proceed in forma pauperis, and requested a temporary restraining order to enjoin the defendant from making further payments of his social security benefits to his son, Robert Garvey, until the Secretary had held a hearing on adequate notice to determine whether the defendant was competent to receive his social security benefit checks. The substance of the original complaint is that the defendant had terminated the plaintiff's benefits under the Social Security Act without prior hearing. The plaintiff seeks monetary damages in the amount of \$552.00.

Hearing was held on the motion for temporary restraining order on March 12, 1974. At the time of hearing it appeared without contradiction that the defendant had received all of the proceeds of the checks issued by the defendant. The plaintiff's request for a temporary restraining order was denied

Filed June 26, 1974  
Leith H. Lybster  
Deputy Clerk

COPY

on the defendant's assurance that benefits would not be terminated and the plaintiff would continue to receive proceeds from all checks issued by the defendant in payment of his benefits. Hearing on the plaintiff's request for a preliminary injunction was continued to enable plaintiff to apply for a hearing to exhaust his available administrative remedies regarding his competency to receive the checks issued by the defendant. The request for a temporary restraining order was denied without prejudice to a renewed request by the plaintiff in the event his benefits were terminated.

On April 1, 1974 the plaintiff filed an amended complaint seeking declaratory relief by way of an adjudication that 42 U.S.C. §§ 405(j), 427 and 1302 are unconstitutional "insofar as said sections authorize the suspension and/or transfer of payments to a representative payee without a prior fair hearing." The requests for certification as class action and to convene a three-judge court were renewed.



The amended complaint asserts the claim that effective December 1, 1973, the Secretary, acting under 42 U.S.C. § 405(j), had certified that payments of the plaintiff's benefits be made to the plaintiff's son, Robert Garvey. The complaint avers that Robert Garvey, as substitute payee, endorsed the checks to the plaintiff for the months of December 1973, January, February and March, 1974. However, he complains that - "since the checks do not come in the Plaintiff's name, Plaintiff is not assured he will receive his Social Security monies."

Hearing on the defendant's motion to dismiss the action, the defendant's opposition to the plaintiff's request for certification as a class action and to convene a three-judge court was held on May 31, 1974. In support of the motion to

dismiss, the defendant presented a copy of a notice from the defendant to the effect that the Secretary had reviewed all information available to the Department and determined on May 22, 1974 the social security benefits for Herbert P. Garvey "should be paid to Herbert P. Garvey directly" and without intervention of a representative. It further appeared that the plaintiff was reinstated as a direct payee effective with the plaintiff's social security check for June 1974.

Upon this showing the defendant's request to convene a three-judge court was denied for the reason that no substantial question was presented to justify action under 28 U.S.C. § 2282. California Water Service Co. v. City of Redding, 304 U.S. 252, 254-255 (1938).

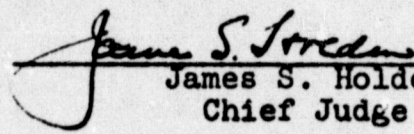


The plaintiff has failed to sustain the burden of establishing the prerequisites for class action certification within the requirements of Federal Rules of Civil Procedure 23(a). Moreover, the Court has no reason to believe the Secretary will treat other proposed members of the class contrary to the administrative action taken in the plaintiff's case according to his notice to the plaintiff of May 8 last.

Since it appears that the plaintiff is no longer aggrieved by the action on the part of the defendant upon which his complaint is founded, the complaint is dismissed without prejudice to his right to request to reinstate the case within sixty days if the social security benefits to which he is entitled are not paid to him directly as indicated by the notice contained in Government's Exhibit A. See Hall v. Beals, 396 U.S. 45 (1969). The Court so ordered at the time of hearing on May 31, 1974.

Dated at Brattleboro, in the District of Vermont, this

26<sup>th</sup> day of June, 1974.

  
James S. Holden  
Chief Judge



